

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM SUB – REGISTRY)
AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 305 OF 2022

(Arising from Miscellaneous Civil Application No. 539/2021)

DOTTO BERNARD BWAKEYA

(LAMECK DITTO)

.....

APPLICANT

VERSUS

MULTICHOICE TANZANIA LIMITE

RESPONDENT

RULING

S.M. MAGHIMBI, J.

The applicant has moved this court under the provisions of Section 2(1) & (3) of the Judicature and Application of Laws Act, Cap 358 R.E. 2019 and Order XI Rule 6(1) of the Civil Procedure Code, Cap 33. R.E. 2019 ("the CPC"). He is moving the Court for the following orders:

- a) That this Honorable Court may be pleased to set aside the dismissal order and restore Misc. Civil Application No. 539/2021 between the

parties herein by this Honorable Court (Hon. Mruma,J) on 13th, July 2022; and

b) Any other relief(s) thus Honorable Court may deem fit and to grant.

The application was supported by an affidavit of Elizabeth John Mlemeta and Erik Dengh, both learned Counsel representing the applicant herein. On the 20th day of March, 2023 when the matter came for necessary order, the parties prayed for and were granted an order that the application be disposed by way of written submission. The applicant's submissions were drawn and filed by Ms. Elizabeth Memeta and the respondent submissions were drawn and filed by Mr. Jovison Kagirwa, learned Counsel representing the respondent.

In her submissions to support the application. Ms. Mlemeta initially moved the court to adopt the contents of the Affidavits and Reply to Counter Affidavit sworn by Elizabeth John Mlemeta and Erick Denga lodged in support of this Application, to form part of her submissions. In her support the prayer to set aside dismissal order and restore the dismissed application to the applicant referred the court to paragraphs 5,6,7,8(a) (e) of the Affidavit of Elizabeth John Mlemeta and paragraph 3,4,5,6 and 7 of the Affidavit of Erick Denga which she pointed out that they elaborate that the factual basis for

this application. Her submissions were that when the Miscellaneous Civil Application No. 539 of 2021 and Civil Case No. 180/2020 (both between the parties herein), were scheduled for hearing and mention respectively, on 13th July 2022 at 10.00AM, the Counsel for the Applicant who was to attend the case on 13th July 2022 (Elizabeth John Mlemeta) was already in open court Number 4 at around 09.48 am where the cases were being called as per the Court clerk instructions. That in all occasions, the Applicant's advocates have diligent in attending the above cases throughout the entire proceedings without missing; the applicant urged court to take judicial notice of its proceedings.

She went on submitting that there was an uncertainty on how the above case were dealt with on the said date of 13th July 2022 as according to previous orders, the cases in (a) above, were scheduled to commence at 10.00 am and the Counsel for the Applicant arrived timely but the court clerk announced the said cases (including the dismissed one) before the scheduled time.

She went on submitting that it is trite law that the Applicant's conduct in the proceedings before the non – appearance that led to dismissal of the matter be taken into consideration in any application to set aside a dismissal

order. She supported her submissions by citing the case of **Shehan Tanzania V. Colletha Simon Chaganike Miscellaneous Laour Application No. 186 of 2020** that cited with approval the case of **Shocked and Another Versus Goldschmidt and others (1998) 1 ALL ER 372** in which at page 4 it was stated that:

She then submitted that in light of the above quoted decision the court is urged to take note of the conduct of the Applicant's counsel before dismissal and hold that the Counsel for the Applicant has never defaulted in entering appearance in Court and this a sufficient reason to allow restoration of the application. She supported this line of submissions by referring the court to the case of *Tulahigwa Kilian Mkongwa versus Boaz Mwakifumbwa Misc. Land Application No. 83 of 2020, High Court*, whereby page 5 it was held as hereunder:

"I also draw inspiration and persuaded by the decision of this court in the case of Sogea Mwatwiz V. Steman Mwasile, Miscellaneous Civil Application No. 13 of 2011 (HC – Mbeya – unreported) which considered the fact that the application had never defaulted in entering appearance in court. Thus,

after visiting the record, I find that the applicant had not defaulted into entering appearance before. Thus, in broad sense of justice, I find that she deserves to be availed another opportunity for her application to be hard on merits.”

She then defended her position on seriousness to pursue the applicant's rights by submitting that dismissal of the application on 13th July 2022, the Applicant promptly filed a letter requesting to be provide a copy of the dismissal order (paragraph 9 of the Affidavit of Elizabeth John Mlemeta), arguing that this evidence diligence on part of the Applicant in prosecuting this matter. She emphasized that this Court has once observed that diligence/ promptness in filling an application following order, can be considered in granting applications to set aside dismissal order, citing the case off **Asha Magoti (Administratix) of the estate of the late Hamis Asil V Hassan Kapuli & Otherwise Misc. Land Application No. 51 of 2021** which cited the case of **Sandru Mangalji Vs Abdul Aziz Lalani Amin Ramji Mehbub Ramji, Misc Commercial Application No. 126 of 2016, at Mwanza (unreported)** whereas the court when granting the application to aside dismissal order stated that:-

"..... I have reached that conclusion having considered among other things the conduct before the dismissal order. The applicant's counsel has all along appearing to prosecute his case and on few occasions that the he did not , he sent another advocate to hold his brief."

She went on submitting that in considering promptness and diligence of the Applicant in the instant application as well as in the dismissed application, she prays that this honorable Court deem it to be a fit case to set aside the dismissal order and restore the application.

On whether the respondent will be prejudiced by the grant of this application, Ms. Mlemeta submitted that the dismissed application is an application for discovery and that the Applicant is exercising her right under Order XI Rule 10 of the Civil Procedure Code. Further that it is in record that during first pretrial conference of Civil Case No. 180 of 2020 in which Miscellaneous Civil Application 539/2021 emanates from, it was ordered by the Court that the Applicant has reserved the right to file an application for discovery and interrogatories. She hence argued that by granting the instant application, the Respondent will not suffer any irreparable loss whatsoever

not will be prejudiced, rather, the Applicants the one who will suffer irreparable loss if the application for restoration is not granted. She cited, among others, the case of Clement George Mwakibinga V. CRDB Branch Manager- Kahama & 2 others Civil Appeal No. 17 of 2019 whereby at page 11 cited with approval the case of Serikali ya Kijiji cha Malangali V. Kasim R. Keren HC Misc. Land Application No. 233 of 2019 (unreported) where the court held:-

"...even if the aid case will be re- admitted, the respondent will not suffer irreparable loss of be prejudiced by allowing this application. The applicant is the one with a likelihood to suffer irreparable injuries considering the nature of dispute/ for interest of justice/ it is just and fair not to punish the applicant for a mistake done."

She hence called upon this court to find that this ground is a sufficient cause for the Court to grant the application and prayed the application be granted.

In reply, Mr. Kagirwa submitted that the Applicant has not indicated sufficient cause to warrant the Court to set aside dismissal Order and restore the dismissed Application. That it is the legal position that the party seeking for setting aside dismissal Order and restoration of the dismissed Application/ Appeal or suit that party has a legal burden to show that his or her failure to appeal on the material date when the matter was called for hearing, was obstructed by sufficient cause/ reason. That the question this Court should ask itself is whether the Applicant has advanced sufficient cause to warrant this Court to set aside the dismissal Order dated 13th July 2022 and restore the Application. He also prayed that the factual ground in opposition to the Application contained in the Counter Affidavit sworn by Advocate Jovison Kagirwa to form part and parcel of his submission.

He went on submitting that the Applicant's reasons advanced before this Court that the Applicant's counsel on the 13th July 2022 was in Court by 09:40 and that she was informed by the Court clerk that the matter was called and dismissed for want of prosecution called for an affidavit of the court to support those allegations. He argued that there is nowhere in the Affidavit where it stated as to why the Affidavit of the person so material to the averment in support of the content/ reason for restoration was not

procure or obtained. He then submitted that the issue is whether the Court can rely on the bare assertion or an Affidavit which mentions another person in the absence of the Affidavit of the person so mentioned, arguing that the answer is negative. He supported his supported his submissions by citing the decision of the Court of Appeal in the case of **Power and Network Backup Ltd Versus Olasfsson Sequeira Civil Application No. 307/18 of 2021** Mwampashi, JA made the following observations:

"The averment in the supporting affidavit that it was the legal advisors who caused the delay, remains to be hearsay because there are no affidavits sworn by the alleged advisors to support the averment. It is a settled position of the law that if an affidavit mentions another person, that other person must swear an affidavit otherwise it will e hearsay. See – NBC Limited V. Superdoll Trailer Manufacturing Company Ltd, Civil Application No. 13 of 2002, Benedict Kimwaga V. Principal Secretary Ministry of Health, Civil Application No. 31 of 2000, (both unreported) and John Chuwa V. Antony Ciza [1992] T.L.R 233. In the former case it was stated that: "an affidavit which

mentions another person is hearsay unless that other person swears as well.

He then argued that in the absence of the Affidavit of the Court Clerk, then the reasons advanced by the Applicant under Paragraphs 7 and 8 of the Affidavit for setting aside dismissal order and for restoration of the application remain hearsay as per the legal position and the decision of the Court of Appeal.

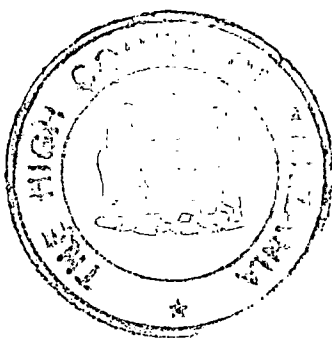
He went on submitting that even assuming that the statement contained in the Affidavit is not hearsay, the facts which he disputes, based on the submission above, the Applicant has failed to advance sufficient cause for her non – appearance. That the averment that both Elizabeth Mlemeta and Erick Dengah were in Court has no factual proof and it raises much doubt since if after all they were in Court then they would have seen the Respondent's counsel whom they knew and there is no reason to believe that they were not cognizant of him since they have appeared in Court on various occasions. He prayed that the application be dismissed with costs.

Having heard the parties, I should not be detained much by this application. The records of the Misc. Application No. 539/2020 are clear that

the applicant has been attending the court without missing. At some dates, Ms Mlemeta even held brief of Mr. Kagilwa when he was not present. The applicant missed one date, the 13th July, 2022 and the application was dismissed. Given how prompt he was in attending the court, he deserves a chance.

There is also the fact that the application was dismissed on the 13/07/2022 and the current application was lodged on 22nd day of July, 2022, only five days later. This is sufficient ground to appreciate that the applicant is not abusing court processes and is keen and matriculate in pursuing his right. That being the case, in the broader sense of Justice, this application is hereby granted. The of this court dated 13th, July 2022 dismissing the Misc. Civil Application No. 539/2021 is hereby set aside. Consequently, the Misc. Civil Application No. 539/2021 is hereby restored to the court records to proceed with the hearing inter parties. Costs shall follow cause.

Dated at Dar es Salaam this 02nd day of May, 2023.



S.M. MAGHIMBI

JUDGE